Set and Sit Contractors Limited v Odhiambo t/a Loi Enterprises (Civil Appeal 56 of 2017) [2023] KEHC 24731 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 24731 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 56 OF 2017

MN MWANGI, J

SEPTEMBER 22, 2023

BETWEEN

SET AND SIT CONTRACTORS LIMITED ..... APPELLANT

AND

SOLOMON WAO ODHIAMBO T/A LOI ENTERPRISES ..... RESPONDENT

(An Appeal from a ruling and order of Hon. C. Makori, Chief Magistrate, dated 1st March, 2017, delivered in Mombasa Chief Magistrate's Court Case No. 2029 of 2015)

JUDGMENT

1. The suit against the appellant in the lower Court was that on diverse dates between November 2014 and December 2014, the appellant requested for various hardware and construction materials worth ksh 7,656,375.00 to be delivered to a construction site within Msambweni, Kwale County. The respondent averred that the said goods were duly delivered and receipt thereof acknowledged. That thereafter, invoices accompanied by detailed statements were issued by the respondent and supplied to the appellant demanding for payment for the said goods. The respondent's claim was for ksh 7,656,375.00 being the amount allegedly due and owing from the appellant to the respondent.

2. The appellant filed a statement of defence dated 26th March, 2015, where it denied all the averments contained in the amended plaint. The appellant averred that in the event it entered into agreements with the respondent on diverse dates between November and December 2014 for supply of various hardware and construction materials, which was denied, the said goods that were delivered were of unmerchantable quality and they were unfit for the purpose which they were ordered. It was stated by the appellant that in the alternative and without prejudice to the foregoing, the goods and services procured from the respondent were paid for in full by the appellant on an invoice being raised, since the respondent received payment for the said goods from the appellant's client Mare Nostrum Limited.

3. On 7th September, 2016, the respondent filed an application dated 5th September, 2016 seeking leave to amend the plaint in the manner shown in the draft amended plaint attached to the affidavit in support of the said application so as to join the parties shown as defendants. In opposition thereto, the appellant filed a replying affidavit sworn by George Aruru Momanyi, a Director of the appellant company who averred that the appellant is an artificial company separate and distinct from its shareholders and Directors in law, and has the power and legal capacity to enter into contracts in its own name, sue and be sued in its own name, and acquire and dispose of property in its own name. The appellant further averred that the Directors of the appellant company had never entered into any contract with the respondent for the supply and delivery of hardware and construction materials, and that they had never guaranteed the appellant company nor undertaken to cater for the appellant company's liability.

4. In the lower Court, a ruling was delivered on 1st March, 2017, where the Trial Court granted the respondent leave to amend his plaint in the manner shown in the draft amended plaint attached to the affidavit in support of the application so as to join George Momanyi as the 2nd defendant and Stephen Kyalo as the 3rd defendant. Costs of the application were awarded to the appellant. The appellant being dissatisfied with the said ruling filed a Memorandum of Appeal dated 17th March, 2017 on 20th March, 2017 raising the following grounds of appeal-

    i. That the learned Magistrate erred in law and fact in granting the respondent leave to amend its pleadings to introduce new parties who were not party to the contract the subject matter of the suit;

    ii. That the learned Magistrate erred in law and fact in failing to appreciate that a company has a distinct and separate legal entity from that of its directors and shareholders and failed to appreciate the law as laid down in *Salomon v Salomon*;

    iii. That the learned Magistrate erred in law and fact in failing to appreciate that the proposed amendment by the respondent was actuated by malice and bad faith as it was only meant to exert undue influence and pressure on the directors of the respondent;

    iv. That the learned Magistrate erred in law and fact in failing to appreciate clear principles enunciated in the case of *Joseph Ochieng T/a Aquiline v First National Bank of Chicago*, Nairobi Civil Appeal no 149 of 1991;

    v. That the learned Magistrate erred in law and fact in taking into account extraneous considerations in arriving at his decision in total disregard of the evidence before him;

    vi. That the learned Magistrate erred in failing to appreciate that in exercise of his discretion to grant leave to amend the respondent's plaint, he ought to have been guided by the applicable legal principles that is, the amendments sought should be made without delay, should be done in good faith and should not occasion prejudice and injustice to other parties;

    vii. That the learned Magistrate failed to appreciate that the amendment sought was brought after an inordinate delay after the lapse of a period of over two years and was thus not brought timeously; and

    viii. That the learned Magistrate failed to appreciate that the amendment sought by the respondent could not have been achieved without prejudicing the appellant.

5. The appellant's prayer is for this Court to allow the appeal with costs, and set aside the ruling and order made on 1st March, 2017.

6. The appeal herein was canvassed by way of written submissions. The appellant's submissions were filed on 28th February, 2019 by the law firm of Kosgey & Masese Advocates, whereas the respondent's submissions were filed by the law firm of Wanja & Kibe Advocates on 2nd July, 2019.

7. Mr. Masese, learned Counsel for the appellant cited the case of *Ali and others v Pattni and another* [1999] 2 EA p. 5, where the Court of Appeal affirmed the principles set out in the case of *Salomon v Salomon* [1897] AC 22. He submitted that a limited company has a separate and distinct legal identity capable of suing and being sued in its own capacity and as a general rule, the Directors of the company are not liable for the omissions or actions of the company.

8. Counsel relied on the case of *Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings Limited* [2015] eKLR, where the Court quoted the case of *Jones & another v Lipman & another* [1962] 1WLR 833. He submitted that the appellant herein is a company, thus an artificial entity, separate and distinct from its shareholders and directors in law. He contended that the respondent did not plead fraudulent or mischievous schemes by the appellant's Directors that would warrant lifting of the corporate veil. It was submitted by Counsel that the appellant's Directors were never a party to the contract with the respondent, which forms the subject matter of the suit herein. That the said Directors acted with authority of the appellant company and on its behalf. He added that they neither guaranteed the appellant company nor undertook to cater for its liabilities. Counsel contended that in allowing the respondent to amend its pleadings, the learned Magistrate lifted the corporate veil without due regard to the arguments and the evidence by the appellant.

9. Mr. Masese cited the case of *Eastern Bakery v Castelino* [1958] EA 461 in which the Court of Appeal discussed instances where an appellate Court will interfere with the discretion of the Trial Judge in allowing or disallowing an amendment to a pleading. He also relied on the case of *Joseph Ochieng T/a Aquiline v First National Bank of Chicago* Nairobi Civil Appeal no 149 of 1991, where the Court of Appeal set out the principles that guide the Court in considering an application for amendment of pleadings. He submitted that the respondent did not provide any compelling or cogent reasons as to why it took two (2) years to file an application for amendment, whereas the facts of the suit have always been within the respondent's knowledge.

10. Counsel stated that the respondent's actions are marred with violence aimed at exerting undue pressure and influence on the appellant's Directors. Mr. Masese asserted that no amount of costs can remedy the prejudice that will be occasioned on the appellant's Directors by dragging them to Court over a debt allegedly owed by the appellant company.

11. Mrs. Kibe, learned Counsel for the respondent submitted that the appeal herein is incompetent and has been overtaken by events since the appellant did not apply for stay of the orders granted by the Trial Court in its ruling that was delivered on 1st March, 2017, and that the respondent has since filed an amended plaint dated 8th March, 2017, which was responded to by the appellant and the new parties being the 2nd and 3rd defendants *vide* an amended statement of defence dated 7th April, 2017. Counsel also submitted that pre-trial directions in the lower Court have since been given thus the appeal herein should be struck out or dismissed with costs as it amounts to an academic exercise.

12. The respondent's Counsel contended that it is clear from the pleadings and documents before Court that the appellant's Directors were party to the contract, that forms the subject matter of the suit, and there was no malice or bad faith on the part of the respondent in seeking to amend the plaint. Mrs. Kibe asserted that the appellant's objections to the joinder of the appellant's Directors based on the principles laid down in *Salomon v Salomon* (*supra*) were misconceived and premature since the suit before the Trial Court is yet to be heard and determined on its merits.

13. On the issue of the delay in bringing the application for amendment, Mrs. Kibe submitted that the Trial Court observed that even though the amendment had taken long to be brought, the matter had never been heard. Counsel stated that the appellant had not demonstrated what prejudice or injustice it stands to suffer as a result of the amendments made or by the joinder of its Directors, and that the amendments were allowed by the Trial Court with costs to the appellant.

14. Mrs. Kibe cited the provisions of Order 1 Rules 3, 6, 7 and 9 and Order 8 Rule 5 of the *Civil Procedure Rules*, 2010 and submitted that amendments before delivery of a judgment are liberally allowed except in exceptional circumstances. She referred to decision of the Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR and submitted that joinder of the appellant's Directors as parties to the suit before the Trial Court is to enable the Court to deal with contentious issues with finality and in the interest of justice

Analysis And Determination.

15. I have re-examined the entire Record of Appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this Court is alive to its duty as the first appellate Court. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated thus-

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions ....."

16. The facts of the suit between the appellant and the respondent in the lower Court is as stated in the first paragraph of this judgment. The respondent in his application to amend the plaint before the Trial Court averred that he had not initially understood the extent and purport of the role played by the parties sought to be joined the suit, and that the said parties gave an undertaking in their personal capacity to pay the amount claimed by the respondent but they failed to honour the said undertaking. In the said application, the respondent stated that the amendment was intended to bring all the necessary parties to Court and bring out the real issues of controversy between the parties and assist the Court to arrive at a just conclusion.

17. In the lower Court, in opposition to the said application, the appellant had stated that it is an artificial company separate and distinct from its shareholders and Directors in law, it has the power and legal capacity to enter into contracts in its own name, sue and be sued in its own name, and acquire and dispose of property in its own name. It further averred that the directors of the appellant company have never entered into any contract with the respondent for supply and delivery of hardware and construction materials, neither had they guaranteed the appellant company nor undertaken to cater for the appellant company's liability.

18. This Court notes that the persons the respondent intended to join as the defendants in the suit before the Trial Court are Directors of the appellant company. It is trite that a company is in law a separate legal personality from its members. This position was established in the well-known case of *Salomon v Salomon* (*supra*). In recent times, the Court of Appeal has in several instances addressed itself on this

issue. In the case of *Victor Mabachi & anor v Nurturn Bates Ltd* [2013] eKLR, the Court of Appeal held as follows-

> " [A company] as a body corporate, is a persona jurisdica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."

19. Section 107 of the *Evidence Act* provides that whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. In an attempt to demonstrate that the appellant's Directors undertook to personally pay the respondent the said amount being claimed in the sum of ksh 7,656,375.00, the respondent in his further affidavit in support of his application for amendment of the plaint before the Trial Court annexed a copy of the agreement which forms the subject matter of the suit therein. A perusal of the said agreement reveals that George Momanyi executed the said agreement on behalf of the appellant herein in his capacity as the Director/proprietor of the appellant company. This is clearly evident from the recital and execution part of the agreement.

20. Accordingly, I do not find merit in the respondent's submissions that the appellant's Directors undertook to pay the respondent ksh 7,656,375.00 owed to it by the appellant on behalf of the appellant company. It is also evident that other than the agreement annexed to the respondent's further affidavit, the respondent did not adduce any other evidence in support of the assertion that the appellant's directors undertook to cater for the appellant's liabilities.

21. Legally, the appellant which is a company, is a legal person and can act through its agents, and in this case, the said George Momanyi, who is a Director of the said company, was such an agent. An agent of a disclosed principle cannot be sued. See the decision by the Court of Appeal in the case of *Anthony Francis Wareheim t/a Wareham & 2 Others v Kenya Post Office Savings Bank*, NRB CA Civil Application nos. Nai 5 & 48 of 2002 the Court held thus-

> " It was also *prima facie* imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued."

22. The respondent submitted that the appellant did not avail the appellant company's resolution in support of its allegations that the appellant's Directors were authorized to enter into such agreements on behalf of the appellant. It is my finding that these submissions are not valid as there is no law that requires an agent of a limited company to avail a company's resolution authorizing him or her to act on matters on behalf of the company, except where the company intends to sue or it has been sued, and the Director is authorized to depone to affidavits on the company's behalf, or where there is a specified requirement that a resolution be provided.

23. It is evident from a perusal of the Trial Court's ruling that it has the same effect as that of lifting and/or piercing the corporate veil, and holding the appellant's Directors personally liable for the acts and/or wrongs of the appellant company. In *Multichoice Kenya Ltd v Mainkam Ltd & another* [2013] eKLR the Court held the following-

> " I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of *Salomon v Salomon* (1897) A.C. 22 Courts have applied the principle of corporate personality strictly.

> But exceptions to the principle have also been made where it is too flagrantly oppose to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity."

24. Looking at the application and the ruling which are the subject of this appeal, the learned Magistrate while appreciating the legal position in the case of *Salomon v Salomon* (*supra*) held that "the said issue can be addressed by leave to the defendants to amend and to determine all the issues in this matter". It is my finding that the said ruling had the effect of lifting the appellant company's corporate veil despite the fact that the Trial Magistrate did not determine whether the respondent had demonstrated the exceptions to the principles of corporate personality.

25. In *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR, being the Court of Appeal case relied on by the respondent in opposition to the appeal herein, the Court of Appeal held that the paramount consideration in allowing joinder of the parties sought to be joined in a suit is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit. The question before the Trial Court is whether the appellant is indebted to the respondent to the tune of ksh 7,656,375.00 for various hardware and construction materials delivered at a construction site within Msambweni, Kwale County at the appellant's request. It is my finding that that is an issue that the Trial Court can aptly determine without the appellant's Directors being joined as parties to the said suit.

26. The respondent submitted that the appeal herein has been overtaken by events since the respondent has since amended his plaint and appellant and its Directors have since filed an amended defence to the said amended plaint. It is this Court's finding that just because the respondent has already amended and filed his amended plaint does not stop this Court from exercising its appellate jurisdiction over the Magistrate's Court, as the said documents shall be expunged from the Trial Court's record following this judgment.

27. It is my finding that the Trial Magistrate erred in allowing the respondent to amend his plaint and include the appellant company's Directors as defendants in the suit in the lower Court, since it was against the principle of a company having a distinct and separate legal personality from its Directors, as was held in the English case of *Salomon v Salomon* (*supra*). In addition, the respondent did not demonstrate that the company was incorporated with the sole aim of deceiving and fraudulently procuring goods or it was carrying on business as no more than a mask or device for enabling the Directors to hide themselves from the eyes of equity.

28. An appellate Court will only interfere with a lower Court's judgment if the same is founded on wrong principles or misdirected itself on the facts and/or law. That was the Court of Appeal's holding in *Mkube v Nyamuro* [1983] KLR, 403-415, at 403 where JA, Kneller & Hannox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

29. It is my finding that the appeal herein is merited. Consequently, I hereby set aside the Trial Court's ruling and the order that was made on 1st March, 2017. I hereby substitute it with an order dismissing the application dated 5th September, 2016, with costs to the appellant. Costs of this appeal shall be borne by the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023.

Judgment delivered through Microsoft Teams Online platform.

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the appellant

Mrs Kibe for the respondent

Ms B. Wokabi – Court Assistant.